

2011

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Recommended Citation

Rosalie Berger Levinson, *The Many Faces of Iqbal*, 43 Urb. Law. 529 (2011).

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The Many Faces of *Iqbal*

Rosalie Berger Levinson*

ON MAY 18, 2009, THE SUPREME COURT HANDED DOWN *Ashcroft v. Iqbal*.¹ Within a matter of months, literally thousands of federal district courts and appellate courts had cited to the case.² It has been called the most significant Supreme Court decision in a decade for day-to-day litigation in federal courts.³ Justice Ginsburg lamented that the Court "messed up the federal rules" governing civil litigation.⁴

It is now nineteen months since the decision—*Iqbal* is a toddler approaching the terrible twos. It is on record as one of the most cited Supreme Court cases in American history.⁵ There are hundreds of law review articles, including several symposium issues, challenging, analyzing, supporting, and critiquing *Iqbal*.⁶ Bills have been introduced in

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1. *Ashcroft v. Iqbal*, 129 S. Ct. 137 (2009).

2. Within the first six months after the Court's ruling there were more than 3,100 citations to the decision by federal judges. See *Alleging Damage to Plaintiffs' Cases, Critics Seek to Overturn Iqbal Ruling*, 78 U.S.L.W. 2304 (Nov. 24, 2009) [hereinafter *Alleging Damage*].

3. Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Rights*, THE NEW YORK TIMES (July 20, 2009) <http://www.nytimes.com/2009/07/21/us/21bar.html>.

4. *Id.* (citing Justice Ginsburg's comments made to a group of federal judges in June 2009).

5. The *Wall Street Journal* quoted Tom Goldstein, founder of the SCOTUS blog, as saying that *Iqbal* would be the most cited case in the next decade. Jess Bravin, *New Look at Election Spending Looms in September*, WALL ST. J., July 2, 2009, at A8, available at <http://online.wsj.com/article/SB124640661014076677.html>. As of January 2011, *Iqbal* had been cited 44,385 times; 17,254 times in cases; 24,308 times in pleadings, motions, and memoranda; 1,387 times in briefs; 1,395 times in secondary sources; and 41 times in administrative decisions. From June 30, 2009, to March 17, 2010, *Iqbal* was cited 512 times per month, making it the fourth most cited case per month. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 (2010).

6. See, e.g., Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN. ST. L. REV. 1191 (2010) (seeking to reconcile the tension between the notice function normally attributed to Rule 8 and the plausibility rule which serves as a gatekeeper preventing frivolous and expensive discovery); Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN. ST. L. REV. 1333 (2010) (situating *Iqbal* and *Twombly* in a line of cases excusing government entities and

Congress to override its rulings.⁷ Various groups, including the American Bar Association,⁸ the U.S. Judicial Conference's Advisory Committee on Civil Rules,⁹ and the Federal Judicial Center,¹⁰ have launched studies aimed at getting a handle on what the impact of *Iqbal* actually has been and what, if anything, should be done about it. Now that we have had nineteen months to mull over these questions, the AALS Section of Civil Rights thought it was time to revisit the many faces of *Iqbal*.

public officials from paying damages for injuries caused by their constitutional wrongdoing); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010) (contending that the plausibility standard fits within the traditional insistence that factual inferences be reasonable and that it does not preclude discovery during the pendency of the motion to dismiss); Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (presenting 2009 data from the Federal Judicial Center refuting the Supreme Court's assumption that new pleading rules were necessary to address excessive discovery costs and coerced settlements); Martin H. Redish & Lee Epstein, *Bell Atlantic v. Twombly and the Future of Pleading in the Federal Courts: A Normative and Empirical Analysis*, Northwestern Public Research Paper No. 10-16, (2008), available at http://www.law.northwestern.edu/searlecenter/papers/Redish_Epstein_final.pdf (arguing that *Iqbal* simply returned pleading rules to what the "notice pleading standard, was always intended to be" and that "plausibility" strikes the appropriate balance between the extremes of fact pleading and "lax" pleading); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 570 (2010) (arguing that plaintiffs in civil rights and employment cases will be more likely to have their claims dismissed and will be deterred from filing in federal courts); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, Seton Hall Public Research Paper No. 1657872, 2010 (discussing the tension between *Iqbal* and *Swierkiewicz*, which permitted a very permissive approach to pleading discrimination claims, and then providing tips on how plaintiffs can survive a motion to dismiss even if it is assumed that *Iqbal* overruled *Swierkiewicz*); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. (forthcoming 2011) (arguing, contrary to Professor Epstein, that the *Iqbal* standard is likely to be procedurally revolutionary in employment cases and marks the effective death of *Swierkiewicz*); Howard M. Wasserman, *Iqbal Procedural Mismatches and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010) (arguing in a symposium piece on *Iqbal* that *Iqbal* cuts off discovery and confers too much discretion on federal judges to subjectively decide what are conclusory allegations, and lamenting that the case will significantly decrease the enforcement and vindication of federal constitutional and civil rights where plaintiffs cannot know or plead essential information with particularity at the outset without the benefit of discovery). See also *infra* note 60 citing articles addressing *Iqbal*'s supervisory liability holding.

7. In July 2009 a bill was introduced in the Senate entitled the Notice Pleading Restoration Act that would bar federal courts from dismissing any case except under the standards established in *Conley*. S. 1504, 111th Cong. (2009). In November 2009, a similar measure was introduced in the House entitled the 2009 Open Access to Courts Act. H.R. 4115, 111th Cong. (2009). See *infra* notes 32–36 and accompanying text.

8. At its February 2011 meeting the American Bar Association Task Force on Federal Pleading Standards intended to provide a report and draft resolution on *Iqbal*. See 79 U.S.L.W. 1552 (Nov. 2, 2010).

9. 78 U.S.L.W. 2304 (Nov. 24, 2009).

10. *Id.*

Iqbal arose as a constitutional tort *Bivens*¹¹ action seeking damages against high ranking federal government officials accused of adopting a post-9/11 policy of classifying Arab Muslim detainees as subjects of "high interest" because of their race, religion, or national origin, and then subjecting them to exceptionally harsh treatment.¹² *Iqbal* was a Pakistani immigrant who was rounded up during the 9/11 sweep for alleged immigration violations.¹³ He was held for more than 150 days under a "hold until cleared" policy.¹⁴ His complaint alleged that Attorney General John Ashcroft and FBI Director Robert Mueller were the architects of a purposefully discriminatory plan.¹⁵ He challenged the conditions of his confinement in a maximum security facility where he was kicked, punched, dragged across the cell, held in solitary confinement, subjected to unnecessary and abusive strip- and body cavity searches, and refused his right to pray.¹⁶ *Iqbal's* complaint asserted that the policy of holding post-9/11 detainees of "high interest" in such extremely egregious conditions of confinement was planned and approved by both Ashcroft and Mueller.¹⁷ In a highly controversial five to four ruling, the Supreme Court rejected the *Bivens* constitutional tort action, laid to rest the *Conley* pleading rules, and created a new restrictive rule for supervisory liability to govern both *Bivens* and § 1983 litigation.¹⁸

As to the pleading requirement, the Court ruled that in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"¹⁹ "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."²⁰ Justice Kennedy explained that while Rule 8²¹ permits liberal pleading, "it does not unlock the doors

11. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In this case the Court crafted a cause of action against federal agents for their violations of constitutional rights. *Id.* at 392–95. For a description of the demise of *Bivens*, see Chemerinsky, *infra* note 31.

12. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

13. *Id.* at 1943.

14. *Id.* at 1943–44.

15. *Id.* at 1944.

16. *Id.*

17. *Iqbal*, 129 S. Ct. at 1944.

18. *Id.* at 1948–49; 42 U.S.C. § 1983 (1996).

19. *Id.* at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that a claim requires a complaint with enough factual matter to suggest that an agreement was made)).

20. *Id.* (citing *Twombly*, 550 U.S. at 555).

21. FED. R. CIV. P. 8.

of discovery for a plaintiff armed with nothing more than conclusions.”²² In short, the Supreme Court’s controversial 2007 *Twombly* decision, which rejected conclusory allegations and mandated plausibility in an antitrust complaint, would apply to all civil litigation.²³

Iqbal then set out a new roadmap for federal district court judges. First, they must identify pleadings that “because they are no more than conclusions, are not entitled to the assumption of truth.”²⁴ Once these are excluded, the court, drawing “on its judicial experience and common sense,” must determine whether the remaining well-pleaded factual allegations plausibly give rise to an entitlement to relief.²⁵ Plausibility, rather than possibility, is the key term—it appears twenty-two times in the majority opinion.²⁶

For *Iqbal* to survive a motion to dismiss, his complaint had to contain facts plausibly showing that Ashcroft and Mueller personally and purposefully adopted a policy of classifying 9/11 detainees as “of high interest” solely because of membership in a particular race, religion, or national origin, and not for a neutral, investigative reason.²⁷ The Court concluded that the complaint failed to do so. In Justice Kennedy’s view, *Iqbal*’s complaint was riddled with “bare assertions” that were entitled to no weight in a Rule 12(b)(6) challenge.²⁸

Thus, judges are now authorized to label allegations “conclusory”—a highly manipulable standard.²⁹ They are invited to look to their own “experience” and “common sense” in evaluating whether other “plausible” explanations for official action make more sense and warrant dismissal of a lawsuit prior to any discovery.³⁰ The debate continues as to whether the Court merely clarified notice pleading under Rule 8, or whether it

22. *Iqbal*, 129 S. Ct. at 1950.

23. *Id.* at 1953.

24. *Id.* at 1949–50.

25. *Id.* at 1950–51.

26. See Edward Brunet, *The Substantive Origins of ‘Plausible Pleading’—An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010) (describing the adverse effect the use of this mistaken word selection has had).

27. *Iqbal*, 129 S. Ct. at 1952.

28. *Id.*, at 1951. Justice Kennedy conceded that “when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief,” but he insisted that legal conclusions “must be supported by factual allegations.” *Id.* at 1950.

29. Miller, *supra* note 6, at 22–23 (arguing that the plausibility standard invites subjective judgments, invades the jury’s functions, and closes the courthouse doors to meritorious claims).

30. *Iqbal*, 129 S. Ct. at 1950. Inviting judges to draw on their own “experience,” rather than attempting to understand and appreciate the plaintiff’s “experience” has generated significant criticism. See, e.g., Darrell A.H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1011–12 (2010).

essentially created a new rule. Many respected authorities, including Dean Chemerinsky, have commented that the model complaints found in the Federal Rules of Civil Procedure would have to be dismissed under the new conclusory allegations/plausibility mandate.³¹

Within months of the decision, bills were introduced in the House and Senate to overturn *Iqbal*.³² Plaintiffs' lawyers lamented that the case was having a major impact—it was cited in more than 3,100 decisions in the first six months, and data showed an increase in successful motions to dismiss in employment discrimination cases and civil rights actions more generally.³³ The 2009 Open Access to Courts Act sought to restore the well-established *Conley* standard, that claims in federal court should presumptively go forward "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."³⁴ Opponents of the Act contended that *Iqbal*'s impact had been highly exaggerated. Playing the terrorism card, they cautioned that a return to *Conley* would have devastating consequences. It would expose government officials to the burdens of defending against baseless civil litigation while simultaneously attempting to protect us from terrorist attacks.³⁵ They urged the Congress

31. Erwin Chemerinsky, *Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law*, 71 MONT. L. REV. 285, 290 (2010); see also Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 149 (2009) (lamenting the Court's reversion to the "facts" versus "conclusions" distinction, which had proved to be unworkable and which had led to the Rules' Advisory Committee's adoption of the current rules); Miller, *supra* note 6, at 25–26 (discussing the disagreement in the lower federal courts as to when allegations should be deemed "conclusory" and challenging the Court's mandate that judges distinguish "conclusions" from "facts").

32. See S. 1504, H.R. 4115, *supra* note 7.

33. See *Alleging Damage*, *supra* note 2; see also Cecelia M. Assam, *House Panel Delves Deeper into Access to Courts Question*, 78 U.S.L.W. 2366, 2367 (Dec. 22, 2009).

34. Assam, *supra* note 33 (quoting *Open Access to Courts Act of 2009: Hearing on H.R. 1115 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 16 (2009) (statement of Rep. Jerrold Nadler)).

35. See *Senate Judiciary Hearing Probes Impacts of High Court Cases Curbing Court Access*, 78 U.S.L.W. 2331–32 (Dec. 8, 2009) [hereinafter *Senate Judiciary Hearing*] (citing former Solicitor General Garre's suggestion that any effort to override *Iqbal* "would have potentially devastating consequences for the proper functioning of our government by exposing government officials to the burdens of defending against baseless civil litigation while attempting to protect the country from terrorist attacks and other threats"); see also Pamela Atkins, Twombly, *Iqbal* Introduce More Subjectivity to Rulings on Dismissal Motions, Judge Says, 78 U.S.L.W. 2667 (May 11, 2010) (noting that several speakers at the ABA Litigation Section program in April 2010 disagreed on the severity of the effect of *Twombly* and *Iqbal*, but expressed agreement that the pending bills in Congress were not the best way to address its problems).

and the Judicial Conference to monitor the situation, but not act rashly.³⁶ Ultimately, no new law was enacted.

New data from the Federal Judicial Center confirms that *Iqbal* has had a dramatic effect. In employment discrimination cases the rate at which motions to dismiss have been granted has increased by 5.3% and the rate of dismissal for other civil rights cases has increased by 9.1%.³⁷ Because civil rights cases often turn upon the defendant's state of mind, and because of the well-recognized informational asymmetry between plaintiffs and defendants,³⁸ it is not surprising that civil rights litigants have been the big losers in the post-*Iqbal* world. Justice Kennedy did not admit that he was imposing a heightened pleading standard,³⁹ but apparently many federal judges have interpreted the decision that way.⁴⁰ Ironically,

36. *Senate Judiciary Hearing*, *supra* note 35. In November 2010 the Federal Judicial Center reported on its research on motions to dismiss filed post-*Iqbal* and asserted that the research was incomplete and that "the time to act" on *Iqbal*/*Twombly* "has not yet come." Eileen Malloy, *A National Survey of Current Case Law*, 79 U.S.L.W. 1656, 1657 (Nov. 23, 2010) (statement of Professor Edward H. Cooper, Reporter, Civil Rules Advisory Comm.).

37. Tom P. Taylor, *Panelists Re-Examine Twombly and Iqbal: Game Changers, or Necessary Clarification?*, 79 U.S.L.W. 1658 (Nov. 23, 2010) (discussing data provided by Federal Judicial Center).

38. *See, e.g.*, *Santiago v. Walls*, 599 F.3d 749, 759 (7th Cir. 2010) (holding that a general allegation as to the prison warden's knowledge was sufficient at the pleading stage because "Mr. Santiago cannot know for certain what Warden Walls knew without discovery").

39. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The Supreme Court has consistently rejected judicial imposition of heightened pleading standards that are inconsistent with the Federal Rules of Civil Procedure. In fact, a few days after *Twombly*, the Court confirmed, in the context of an employment discrimination case, that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint" and cannot reject allegations of harm as "too conclusory." *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (*per curiam*). Further, in *Twombly*, Justice Souter cited *Swierkiewicz*, a 2002 decision which rejected use of a heightened pleading standard that would require plaintiffs to plead "specific facts" establishing a *prima facie* case. *Twombly*, 550 U.S. at 547; *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) ("[I]mposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"); *see also Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) ("our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process," and thus the court of appeals erred in adopting a heightened proof standard in actions that require proof of motive); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules.").

40. *See Janet Cecelia Walthall*, *Iqbal, Twombly Pleading Standards Hotly Debated by Conference Panelists*, 78 U.S.L.W. 2782 (June 29, 2010) (quoting panelists at the American Constitution Society's Annual Convention who disagreed as to whether these cases constituted a "sea change" or a "mere ripple" in practical terms, but who

though, a recent Eleventh Circuit case relied on *Iqbal* to reject its previous use of a heightened pleading standard in qualified immunity cases.⁴¹ The court acknowledged that its application of a heightened standard in § 1983 qualified immunity issues was effectively overturned by the *Iqbal* Court.⁴² Plausibility, not heightened pleading, is the new buzz word.

Professor Alex Reinert, a former law clerk for Justice Breyer, argued the *Iqbal* case before the Supreme Court. Since the decision, Professor Reinert has done extensive empirical research on *Iqbal*'s impact on pleading.⁴³ In November 2010, he participated in a webinar panel discussion on *Pleading in a Post-Twombly and Iqbal World: Where Things Stand*.⁴⁴ He is thus eminently qualified to bring us up-to-date on this topic.⁴⁵

The Second Face of *Iqbal* addressed by this panel is the Court's ruling on supervisory liability. Defendants Ashcroft and Mueller conceded that they could be held personally liable if they knew of and yet acted with deliberate indifference to their subordinates' use of discriminatory criteria.⁴⁶ The Supreme Court, however, rejected the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's (sic) violating the Constitution."⁴⁷ The Court reasoned that in both *Bivens* and § 1983 actions "the term 'supervisory liability' is a misnomer" because government officials may only be held liable for their own misconduct.⁴⁸ Because *Iqbal* claimed invidious discrimination in violation of the First and Fifth Amendments, his complaint had to allege facts establishing that Ashcroft and Mueller themselves engaged in purposeful discrimination, not just that they had knowledge of and acquiesced in the discriminatory animus of their subordinates.⁴⁹

agreed that "there is lots of confusion among judges who themselves are saying this is a sea change"). A few circuits have suggested that the liberal pleading rule set forth in *Swierkiewicz* has been repudiated by *Twombly* and *Iqbal*. See Karen M. Blum, *Section 1983 Litigation: Post-Pearson and Post-Iqbal*, 26 *TOURO L. REV.* 433, 454-56 (2010) (citing cases from the Third and Fourth Circuits); see also *Swanson v. Citibank N.A.*, 614 F.3d 400, 403-04 (7th Cir. 2010) (acknowledging that federal courts are "still struggling" with the question of how high the Supreme Court meant to set the pleading bar, but cautioning that the plausibility requirement "does not imply that the district court should decide whose version to believe, or which version is more likely than not").

41. *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010).

42. *Id.* at 707-10.

43. See Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 *IND. L.J.* 119, 120 (2011) (finding no correlation between a complaint's merit and its factual detail).

44. See Taylor, *supra* note 37 (discussing Reinert's contribution to webinar).

45. Alex Reinert, *The Impact of Ashcroft v. Iqbal on Pleading*, 43 *URB. LAW.* 559 (2011).

46. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1957 (Souter, J., dissenting).

47. *Id.* at 1949.

48. *Id.*

49. *Id.* at 1948; see also Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 *UMKC L. REV.* 931, 940 (2010) (questioning

Iqbal pleaded in his complaint that the defendants “‘knew of, condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin.’”⁵⁰ He alleged that “Ashcroft was the ‘principal architect’” of this invidiously discriminatory policy and “that Mueller was ‘instrumental’ in adopting and executing it.”⁵¹ But the Court determined that these were “bare assertions” that amounted to “nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”⁵² They were “conclusory” and thus not entitled to an assumption of truth.⁵³ Justice Kennedy asserted that Iqbal’s “complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind.”⁵⁴

The dissent lamented the majority’s rejection of the prevailing knowledge/acquiescence standard for supervisory liability.⁵⁵ Justice Souter explained, “Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely”⁵⁶—and this applied to § 1983 as well.⁵⁷ Because the defendants conceded that they could be held liable under a knowledge/acquiescence theory and challenged only use of a constructive notice theory, the issue was not even briefed.⁵⁸ Rather, the Court *sua sponte* decided to restrict the scope of supervisory liability for all civil rights litigants.⁵⁹

why categorizing based on race does not satisfy the equal protection standard without further evidence of “animus”).

50. *Iqbal*, 129 S. Ct. at 1951.

51. *Id.*

52. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

53. *Id.* at 1941.

54. *Id.* at 1952.

55. *Iqbal*, 129 S. Ct. at 1957 (Souter, J., dissenting).

56. *Id.* Justice Souter proceeded to list the various tests for supervisory liability established in the appellate courts, including constructive knowledge, gross negligence, and recklessness in supervising subordinates. *Id.* at 1958 (Souter, J., dissenting).

57. *Id.* at 1948 (“Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”).

58. The cert question before the Court was whether liability could be imposed on a theory of constructive versus actual knowledge. Petition for Writ of Certiorari, *Iqbal*, 129 S. Ct. 1937 (07-1015). Specifically, the Second Question Presented reads “Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.” *Id.*

59. *Iqbal*, 129 S. Ct. at 1948.

As with the pleading decision, there is considerable disagreement as to the breadth and meaning of *Iqbal*'s ruling on supervisory liability.⁶⁰ Some courts have held that its restrictive mandate of "purposeful discrimination" on the part of the supervisor applies only where the underlying constitutional violation imposes such a standard—namely in equal protection cases.⁶¹ Where the underlying constitutional rights violation mandates only "objective unreasonableness," as in Fourth Amendment claims, or deliberate indifference, as in Eighth Amendment or substantive due process cases involving arrestees and detainees, factual allegations need only "plausibly" suggest this less culpable state of mind.⁶²

Karen Blum, Professor and Associate Dean at Suffolk, has written and lectured widely on this topic.⁶³ Professor Blum advocates a unified theory of liability for supervisors who fail to train, screen, or supervise those who commit constitutional violations. For years, she has been a key speaker on § 1983 issues for the Federal Judicial Center. She is an expert in municipal liability and she co-authors a treatise entitled *Police Misconduct, Law and Litigation*.

Our program will conclude with Erwin Chemerinsky, Founding Dean and Distinguished Professor of Law at the University of California, Ir-

60. See, e.g., Kit Kinports, *Iqbal and Supervisory Immunity*, 114 PENN. ST. L. REV. 1291 (2010) (challenging the Court's "misguided assumption that the doctrine of supervisory liability is indistinguishable from *respondeat superior*"); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after Iqbal*, 14 LEWIS & CLARK L. REV. 279 (2010) (agreeing that the state of mind necessary to support supervisory liability should be based on the particular constitutional violation asserted, but disagreeing that the constitutional approach will improve the over-deterrence problem of § 1983).

61. See, e.g., *Dodds v. Richardson*, 614 F.3d 1185, 1197–99 (10th Cir. 2010) (noting that at least the Ninth Circuit has read *Iqbal* to mandate "purpose" only in cases of alleged racial discrimination by governmental officials). The Eighth Circuit has used the less rigorous deliberate indifference standard in cases alleging failure to train, screen, or protect. See *Whitson v. Stone Cnty. Jail*, 602 F.3d 920, 927–28 (8th Cir. 2010) (holding that a claim could proceed against supervisors for failing to protect plaintiff from sexual assault by male prisoner if supervisors personally displayed deliberate indifference to the risk that plaintiff would be assaulted by other inmates); *Parrish v. Ball*, 594 F.3d 993, 1001–02 (8th Cir. 2010) (holding that *Iqbal* mandates that a government official must, through his own individual acts, have violated the Constitution, but that liability can arise from a failure to supervise and train detainee where there is evidence of notice regarding a pattern of unconstitutional acts committed by subordinates, deliberate indifference or tacit authorization of the offensive acts, failure to take sufficient remedial action, and evidence that the failure proximately caused the injury).

62. See Nahmod, *supra* note 60, at 296–98; see also Blum, *supra* note 40, at 461.

63. See, e.g., Blum, *supra* note 40; Karen M. Blum, *Supervisory Liability after Iqbal: Misunderstood But Not Misnamed*, 43 URB. LAW. 541 (2011).

vine Law School. Dean Chemerinsky's treatise on federal courts is well respected and widely used. He has also authored a textbook and treatise on Constitutional Law and over a hundred law review articles. In addition to being a prolific writer, he is a frequent lecturer on constitutional law, civil rights, and the Supreme Court. In 2006 he filed a *Bivens* action on behalf of former CIA agent Valerie Plame.⁶⁴

Finally, I want to briefly mention a fourth issue lurking in the background of the *Iqbal* case, namely, prosecutorial immunity. Ashcroft and Mueller presented their case as a qualified immunity case.⁶⁵ This was a key topic during oral argument where Justice Scalia asserted that the ability of the Attorney General of the United States and the Director of the FBI to do their jobs without having to litigate personal liability should not "be dependent upon the discretionary decision of a single district judge."⁶⁶ *Iqbal* involved the highest ranking officials—cabinet-level policymakers responding to the national threat of 9/11.⁶⁷ The Supreme Court has frequently stated, and it reiterated in *Iqbal*, that the substantive policy behind its immunity doctrine demands a mechanism for swift exit from "disruptive" discovery and other distractions of a lawsuit.⁶⁸

The Court in *Iqbal* never reached the qualified immunity issue—it found a swift exit mechanism in its pleading and supervisory liability rulings. The former Attorney General, however, faces liability in another post-9/11 case. On October 18, 2010, the Supreme Court granted review in *Ashcroft v. al-Kidd*.⁶⁹ John Ashcroft seeks absolute or, at minimum, qualified immunity from claims alleging that, when he detained al-Kidd as a material witness, it was actually for the purpose of investigating al-Kidd's role in terrorist activities, or preemptively detaining him.⁷⁰ The complaint alleged that Attorney General Ashcroft developed, implemented, and set in motion, a policy of using the federal material witness statute pretextually to arrest and detain terrorism suspects

64. See Chemerinsky, *supra* note 31 (discussing his representation of Valerie Plame). Dean Chemerinsky's remarks are not republished here.

65. *Iqbal*, 129 S. Ct. at 1942.

66. Transcript of Oral Argument at 3–5, 35–36, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) (comment of Justice Scalia).

67. *Iqbal*, 129 S. Ct. at 1956.

68. *Id.* at 1953–54; see also *Harlow v. Fitzgerald*, 457 U.S. 800, 816–17 (1982) (recognizing "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service").

69. *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 131 S. Ct. 415 (2010).

70. *Id.* at 958, 964.

for whom there was insufficient evidence of probable cause to arrest on criminal charges in violation of the Fourth Amendment.⁷¹ Thus, the Supreme Court is poised to again take up difficult questions about the parameters of civil liability for high-profile figures, particularly during a national security crisis that appears to have no end date.

Karen M. Blum*

C. Introduction: *Ashecroft v. Iqbal*

YES, VIRGINIA, THERE REALLY IS SUPERVISORY LIABILITY, BUT IT'S COMPLICATED. Let me explain. In a case that was about pleading requirements,² and a case in which the issue of supervisory liability had not been briefed or argued by the parties,³ Justice Kennedy, writing for a five-member majority of the Court in *Ashecroft v. Iqbal*,⁴ warned a judicial warld and

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1. As Federal Magistrate Judge Jeremiah McCurdy has recently observed, "litigants may have been living in a cave . . . because by now no members of the federal bench or bar who are acquainted with the changes wrought in the federal pleading landscape by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* (550 U.S. 544 (2007)) and *Ashecroft v. Iqbal* (129 S.Ct. 1828 (2009))" Jeremiah J. McCurdy and Matthew D. Yonick, *Twombly and Iqbal: How the Court "Blinded Us by Federal Rules"*, 2010 FED. CIR. L. REV. 1. There are many scholarly works addressing the impact of "*Iqbal*" on pleading. See, e.g., Alexander A. Ravett, *The Crisis of Unpleaded Pleading*, 80 IOWA L.J. 119 (2011); Aaron R. Miller, *From Causality To Probability: Is *Iqbal* A Double-Edged Sword For Federal Rule 8(a)(2) Pleadings*, 60 FORD L. L.J. (2012); Aaron R. Miller, *The Pleading Problem*, 48 STAN. L. REV. 1293 (2010); Robert G. Bone, *Pleading Pleading: Revisited And Revised: A Comment On *Ashecroft v. Iqbal**, 25 NOTRE DAME L. REV. 843 (2010).

2. As Justice Souter noted in his dissent, *Ashecroft* and *McCurdy* had conceded that "this a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct" were grounds for *Ashecroft* liability. *Ashecroft v. Iqbal*, 129 S. Ct. 1828, 1957 (2009) (Souter, J. joined by Stevens, J., Ginsburg, J., and Breyer, J. dissenting). The issue presented on appeal was whether the allegations of the complaint were sufficient to state such a claim. Because of the confusion, the Court "rehears[ed] on briefing or argument on the proper scope of supervisory liability." *Id.* at 1957.

3. 129 S. Ct. 1828 (2009). The only other case in which the Court has addressed the issue of supervisory liability is *Bishop v. Gaudin*, 423 U.S. 548 (1975), where the Court held that the supervisor of the individual whose constitutional rights were violated was

71. *Id.* at 952–53. (quoting *Id.* at 571).